Filed 4/11/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BONNIE HERNANDEZ, as Co-administrator, etc., et al., Plaintiffs and Appellants, v. CITY OF POMONA et al., Defendants and Respondents.	B182437 (Los Angeles County Super. Ct. No. BC228397)

APPEAL from a judgment of the Superior Court of Los Angeles County. R. Bruce Minto, Judge. Reversed.

Moreno, Becerra, Guerrero & Casillas, Danilo J. Becerra and Lizette V. Espinosa for Plaintiffs and Appellants.

Alvarez-Glasman & Colvin and Roger A. Colvin for Defendants and Respondents

The plaintiffs in this negligence action are the parents, wife, seven minor children and estate of George Hernandez who, while fleeing arrest, was shot 22 times by police

officers of the City of Pomona. Defendants are the four officers involved in the shooting and the city.

Plaintiffs appeal from the judgment after the trial court sustained defendants' demurrer to their complaint. The issue is whether a federal jury's verdict in favor of a city and three of its police officers and the district court's judgment in favor of a fourth officer in a federal civil rights case precludes the same plaintiffs from bringing a negligence action in state court against the same defendants based on the same facts. Under the circumstances here we conclude it does not and reverse the judgment.

FACTS AND PROCEEDINGS BELOW

The Federal Civil Rights Action

Plaintiffs initially sued the police officers and the city in federal district court alleging causes of action for negligence under state law and violation of Hernandez's civil rights under federal law[1]—specifically the right under the Fourth Amendment to be free from "unreasonable" seizure.[2] The complaint stated: "[Hernandez] was being chased on foot by [the officers] and indicated to them that he was unarmed. He turned towards them and raised his empty hands in the air. At that time, [the officers] fired their firearms striking [Hernandez] with fatal gunshots." Plaintiffs further alleged Hernandez was unarmed and the shooting was "without reasonable cause."

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[1] 42 United States Code section 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] The use of excessive force in making an arrest is a violation of the Fourth Amendment's prohibition against "unreasonable" seizure. (*Graham v. Connor* (1989) 490 U.S. 386, 395.)

The district court bifurcated the state and federal claims and only the federal civil rights cause of action went to trial. The jury returned a general verdict in favor of the city and three of the officers, Cooper, Devee and Luna. It could not reach a verdict as to the fourth officer, Sanchez.

Following the trial, defense counsel moved for judgment as a matter of law in favor of Sanchez under Rule 50 of the Federal Rules of Civil Procedure.[3] Based on the evidence presented at trial, the district court found Sanchez and the other officers had cause to believe Hernandez was armed, even though it turned out he was not. "Sanchez found himself in a situation that he reasonably believed would threaten his life if he did not act immediately." Therefore, the court concluded, Sanchez's "use of deadly force was reasonable under the circumstances." The court further found Sanchez was entitled to qualified immunity even if he had violated Hernandez's civil rights because he "reasonably could have believed his conduct was lawful under the circumstances."

Based on the jury's verdict and the Rule 50 judgment in favor of the defendants the district court declined to assume supplemental jurisdiction over plaintiffs' state law negligence claim and dismissed it without prejudice. The court entered a final judgment in favor of the city and the four police officers.

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[3] Under Rule 50, subdivision (a) the trial court may determine an issue against a party and grant a motion for judgment as a matter of law against that party "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

The State Court Action

After a final judgment was entered in the federal court plaintiffs commenced the present action against the same defendants alleging defendants "negligently, violently and without due care, and without provocation, fatally shot and killed plaintiffs' decedent George Hernandez."

Defendants demurred to the complaint on the grounds the federal court judgment and the applicable statute of limitations barred this action. They requested the trial court take judicial notice of the complaint, the Rule 50 order and the judgment in the federal court action as well as plaintiffs' tort claims filed with the city.

The trial court rejected defendants' statute of limitations argument but concluded the federal court judgment barred plaintiffs' cause of action for negligence.[4] Plaintiffs filed a timely appeal from the final judgment dismissing their action.

DISCUSSION

California appellate courts have reached conflicting conclusions as to whether a judgment for defendants in a federal court action under 42 U.S.C. section 1983 alleging excessive force in violation of the Fourth Amendment precludes a state court action for negligence against the same defendants by the same plaintiffs.[5]

Based on the procedural circumstances of the case before us we conclude neither res judicata nor collateral estoppel preclude plaintiffs' negligence action against the defendants in this case.

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[4] Defendants have not pursued their statute of limitations argument on appeal.

[5] See *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 445-448 (state court action barred by res judicata but not by collateral estoppel); *Harris v. Grimes* (2002) 104 Cal.App.4th 180, 186-187 (state court action not precluded by res judicata or collateral estoppel); *City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077, 1082-1083 (state court action barred by res judicata).

I. THE DOCTRINE OF RES JUDICATA DOES NOT BAR PLAINTIFFS' NEGLIGENCE CAUSE OF ACTION AGAINST THE OFFICERS.

A. Grounds For Asserting Res Judicata—The Primary Rights Theory

Under the doctrine of res judicata a valid, final judgment on the merits precludes parties or their privies from relitigating the same "cause of action" in a subsequent suit.[6] "Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. '"Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."' [Citation.]"[7]

California law defines a "cause of action" for purposes of the res judicata doctrine by analyzing the primary right at stake: "[A] 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action. [Citation.]"[8] "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised."[9]

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[6] *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.

[7] *Mycogen Corp*. v. *Monsanto Co*., *supra*, 28 Cal.4th at page 897.)

[8] *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 [suit for malicious prosecution lies for bringing an action charging multiple grounds of liability when some but not all of those grounds were asserted with malice and without probable cause].

[9] *Crowley v. Katleman*, *supra,* 8 Cal.4th at page 681.

"'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.]'"[10] "'. . . If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]' [Citation.]"[11]

California courts have disagreed over whether an action for violation of the Fourth Amendment's prohibition against unreasonable seizures implicates the same primary right as an action for violation of the right to be free from negligent personal injury.

In *Mattson v. City of Costa Mesa* plaintiff filed a section 1983 action against the city and two of its police officers alleging the officers had "knowingly and without provocation or probable cause assaulted [him] and then arrested him[.]"[12] The complaint also alleged a cause of action for negligence based on the same facts.[13] The federal court declined to take jurisdiction over this supplemental state claim. Following a unanimous verdict for the defendants, plaintiff served the same defendants with a state court action alleging the officers had "'negligently assaulted, battered and arrested plaintiff' and 'mishandled his personal property.'"[14] The trial court sustained the defendants' demurrer

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[10] *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.

[11] *Tensor Group v. City of Glendale*, *supra*, 14 Cal.App.4th at page 160.

[12] *Mattson v. City of Costa Mesa*, *supra*, 106 Cal.App.3d at page 444.

[13] *Mattson v. City of Costa Mesa*, *supra*, 106 Cal.App.3d at page 444.

[14] *Mattson v. City of Costa Mesa*, *supra*, 106 Cal.App.3d at page 444.

on the ground plaintiff's action was barred by res judicata and collateral estoppel and entered a judgment of dismissal.[15]

The Court of Appeal affirmed on the ground the doctrine of res judicata barred the second action.[16] The court reasoned "the singlemost determinative factor" in deciding whether two suits involve the same primary right "is the substantive right of the plaintiff allegedly violated, the harm suffered."[17] Here, the court held, "the right to be free from personal injury, and . . . the right to be free from arrest unless pursuant to a warrant valid on its face or upon reasonable cause and, in either event, without excessive force" constituted the same primary right.[18]

In *Harris v. Grimes* a police officer shot and killed Harris's unarmed son during the nighttime execution of a search warrant.[19] Harris filed a complaint in federal court against the officer alleging civil rights violations under section 1983 and a cause of action for negligence under state law. A jury rendered a verdict for the officer on the civil rights action and the court dismissed the negligence claim without prejudice.[20] Harris refiled her negligence claim in state court. That case was dismissed for reasons not relevant to the issue before us. Harris then filed a malpractice action against one of the attorneys who had handled the state action. The defendant contended Harris could not establish damages for malpractice because she could not have succeeded on her action against the police officer as that action was barred by res judicata and collateral estoppel. The trial court agreed and entered judgment for the defendant.[21]

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[15] *Mattson v. City of Costa Mesa*, *supra,* 106 Cal.App.3d at page 445.

[16] *Mattson v. City of Costa Mesa*, *supra,* 106 Cal.App.3d at pages 446-448.

[17] *Mattson v. City of Costa Mesa*, *supra,* 106 Cal.App.3d at page 447.

[18] *Mattson v. City of Costa Mesa*, *supra,* 106 Cal.App.3d at page 447.

[19] *Harris v. Grimes*, *supra,* 104 Cal.App.4th at page 183.

[20] *Harris v. Grimes*, *supra,* 104 Cal.App.4th at page 183.

[21] *Harris v. Grimes*, *supra,* 104 Cal.App.4th at pages 184-185.

The Court of Appeal reversed. It held the federal jury's general verdict for the police officer was not res judicata in Harris's state court action against the officer for negligence. The court rejected the defendant's contention an action for use of excessive force under the Fourth Amendment and an action for negligence involved the same primary right to be free from unreasonable use of force. "'[R]easonable' conduct in civil rights law," the court held, "does not always mean reasonable conduct under negligence law. The two concepts are not the same."[22]

In *City of Simi Valley v. Superior Court* the decedent, Bayer, led the city police on a high speed chase which ended with a confrontation and standoff in a residential neighborhood. While sitting in his car Bayer pulled out a handgun, cocked it and pointed it at the officers. The officers fired several rounds of tear gas to try to extract Bayer from his car. Bayer got out of the car with his gun drawn whereupon the officers shot and killed him.[23] Bayer's family filed an action in federal court against the city under section 1983 alleging that in firing tear gas into the car the officers used excessive force in violation of the Fourth Amendment. They accompanied this cause of action with a state law claim for wrongful death The federal court granted defendants' motion for summary judgment on the ground "the police officers' 'conduct was objectively reasonable' and that the officers did not use excessive force in firing tear gas to extract decedent from the car."[24] The court declined to exercise jurisdiction over the state law claim and dismissed it without prejudice.[25] The family then filed an action against the city in state court alleging a cause of action for wrongful death. The trial court overruled the city's demurrer which asserted the action was barred by res judicata and collateral estoppel.[26]

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[22] *Harris v. Grimes*, *supra*, 104 Cal.App.4th at page 187.

[23] *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at pages 1080-1081.

[24] *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at page 1081.

[25] *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at page 1079.

[26] *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at pages 1079, 1082-1083.

The Court of Appeal issued a writ of mandate directing the trial court to sustain the demurrer on the ground of res judicata. Although the court's rationale is not clear it apparently concluded, contrary to *Harris v. Grimes*,[27] the federal and state actions were premised upon violation of the same primary right—the right to be free from unreasonable use of force.[28]

B. An Excessive Force Action Under The Fourth Amendment And A Personal Injury Action Under Common Law Negligence Do Not Involve The Same Primary Right.

We hold the doctrine of res judicata does not apply to the case before us. The primary right at issue in the section 1983 action was Hernandez's right under the Fourth Amendment to be free from unreasonable seizure of his person.[29] The primary right in the negligence action is Hernandez's right to be free from injury to his person.[30] That some of the same facts are involved in both actions is not determinative; the significant factor is the nature of the harm.[31] The nature of the harm in the former action was the violation of a constitutionally protected right. The nature of the harm in the latter action is the violation of a common law right. As the United States Supreme Court has observed, the federal Constitution and traditional tort law "do not address the same concerns."[32]

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[27] *Harris v. Grimes*, *supra*, 104 Cal.App.4th at page 187.

[28] *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at pages 1083-1084.

[29] United States Constitution, Fourth Amendment; *I.A. Durbin, Inc. v. Jefferson Nat. Bank* (11th Cir. 1986) 793 F.2d 1541, 1550.

[30] *Slater v. Blackwood*, *supra*, 5 Cal.3d at page 795.

[31] *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954.

[32] *Daniels v. Williams* (1986) 474 U.S. 327, 333.

C. A Federal Court's Discretionary Refusal To Exercise Supplemental Jurisdiction Over A State Claim Does Not Bar Further Litigation Of The State Claim In State Court.

As a separate and independently sufficient ground for reversing the judgment we hold that even if only a single primary right (and therefore a single cause of action) is involved in this case, a federal court's discretionary refusal to exercise supplemental (formerly "pendent") jurisdiction over a state claim does not bar further litigation of the state claim in state court—at least when the federal court does not dismiss the state-based causes of action until after it has decided the federal civil rights claims.

In *Lucas v. County of Los Angeles* the court explained: "This theory of primary rights does not aid respondent because, as the trial court astutely observed, it was not appellant who made the decision to 'split' causes of action between state and federal court. Appellant tendered the entire case to the federal court, which had pendent jurisdiction to determine the state causes of action but declined to exercise it. [Citations.] A federal court's discretionary refusal to exercise pendent jurisdiction over a state claim does not bar further litigation of the state claim in state court. [Citation.]"][33] In *Harris v. Grimes* the court agreed with the reasoning in *Lucas*, stating: "*Lucas* is consistent with the Restatement Second of Judgments' expression of widely held legal principles, which distinguishes between a party's splitting of its causes of action and a court's doing the same thing."[34]

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[33] *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 286.

[34] *Harris v. Grimes*, *supra*, 104 Cal.App.4th at page 188. In *Acuña v. Regents of University of California* (1997) 56 Cal.App.4th 639, 650-561, Division Six of this court, which had one year earlier decided *Lucas v. County of Los Angeles, supra,* 47 Cal.App.4th at page 286, held res judicata barred a separate state court action when the federal court's dismissal of the state law claims occurred *prior* to the determination of the merits of the federal claims asserting the same primary rights. Division Six employed the same rationale to reach the same conclusion six years later in *City of Simi Valley v. Superior Court*, *supra*, 111 Cal.App.4th at pages 1083-1084. Similarly, in *Mattson v.*

We conclude, therefore, the trial court erred in sustaining the demurrers of officers Cooper, Devee, Luna and Sanchez.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR PLAINTIFFS' NEGLIGENCE CAUSE OF ACTION AGAINST OFFICERS COOPER, DEVEE AND LUNA.

A. Grounds For Asserting Collateral Estoppel

It is well-settled in California a second action between the same parties on a different cause of action is not precluded by a previous judgment but the previous judgment operates as an estoppel to litigating such issues in the second action as were actually litigated and adjudicated in the first.[35] Thus, "a judgment based on a general verdict, in an action wherein a determination of any one of several issues may have been the basis for that verdict, does not authorize the application of the doctrine of estoppel by

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City of Costa Mesa, supra, 106 Cal.App.3d at page 455, which also applied the doctrine of res judicata to bar state court litigation of state law claims dismissed by the federal court, the dismissal of the pendent state law claims occurred prior to the trial of the federal claim; and the court emphasized that the plaintiff had knowingly proceeded to trial on the federal claim alone.

Although the federal court's dismissal of the state negligence claims in *Harris v. Grimes, supra,* 104 Cal.App.4th at pages 187-189, occurred after summary judgment was granted in favor of the defendant officers and thus fell on the *Lucas v. County of Los Angeles, supra,* 47 Cal.App.4th at page 286, side of the before-or-after-merits-determination line, Division Eight expressly disagreed with *Mattson v. City of Costa Mesa, supra,* 106 Cal.App.3d at page 455, holding it did not constitute the impermissible splitting of a single cause of action for a plaintiff to refile in state court after a federal court had dismissed a state law claim within its supplemental jurisdiction even if that dismissal occurred prior to summary judgment or trial on the merits. Because the dismissal in this case occurred only after trial, however, our own resolution of that conflict can await another day.

[35] *Todhunter v. Smith* (1934) 219 Cal. 690, 695; 7 Witkin, California Procedure (4th ed. 1997) section 354, page 915.

judgment to such issues in a subsequent action under circumstances where . . . it is necessary to identify the specific issue determined in the former action[.]"[36]

B. Elements Of A Cause Of Action Under 42 U.S.C. Section 1983—Excessive Force

To establish a claim under section 1983 a plaintiff must prove the deprivation of a right secured by the Constitution or laws of the United States, the deprivation was committed by a person acting under color of state law and the person acted intentionally, recklessly or with gross negligence or in some other way more blameworthy than mere negligence.[37]

Police officers attempting to make an arrest are clearly acting under color of state law.

Claims of excessive force by police officers in effectuating an arrest are justicible under section 1983 because they implicate the Fourth Amendment's guarantee to "the people" of the right "to be secure in their persons . . . against unreasonable searches and seizures." As the United States Supreme Court held in *Graham v. Connor*, "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.][38] In an excessive force case the "reasonableness" inquiry is an objective one. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil

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[36] *Stout v. Pearson* (1960) 180 Cal.App.2d 211, 216.

[37] 42 United States Code section 1983 (see footnote 1, *ante*); *West v. Atkins* (1988) 487 U.S. 42, 48; see *Daniels v. Williams*, *supra*, 474 U.S. at page 328.

[38] *Graham v. Connor*, supra, 490 U.S. at page 395.

intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[39]

Although the United States Supreme Court has never directly ruled on the question it is generally accepted a cause of action under section 1983 for use of excessive force in violation of the Fourth Amendment must be based on something more than mere negligence. This view is supported by the court's observation in *Baker v. McCollan*—"Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law"[40]—and by its statement in *Daniels v. Williams*—["I]njuries inflicted by governmental negligence are not addressed by the United States Constitution[.][41] In the Ninth Circuit at least, liability under section 1983 requires proof "the acts or omissions of the defendant were intentional[.]"[42]

Finally, even if the facts show the officer's conduct violated the Fourth Amendment "[q]ualified immunity shields the officer from suit when she makes a

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[39] *Graham v. Connor*, *supra*, 490 U.S. at page 397.

[40] *Baker v. McCollan* (1979) 443 U.S. 137, 146.

[41] *Daniels v. Williams*, *supra*, 474 U.S. at page 333. More narrowly the court held Daniels' claim prison officials negligently deprived him of property in violation of the due process clause of the Fourteenth Amendment did not state a claim for relief under section 1983. The court observed, however, a determination whether "merely negligent conduct may be enough to state a claim" under section 1983 "depend[s] on the right" allegedly violated, *id.* at p. 330, and "we need not rule out the possibility that there are . . . constitutional violations that would be violated by mere lack of care . . . ." (*Id*. at p. 334.) In *Whitley v. Albers* (1986) 475 U.S. 312, 319 the court held a prisoner's claim prison officials used excessive force against him in violation of the Eighth Amendment's cruel and unusual punishment clause "must involve more than ordinary lack of due care for the prisoner's interests or safety." Finally, in *Zinermon v. Burch* (1990) 494 U.S. 113, 129, footnote 14 the court described *Daniels v. Williams* as "rul[ing] . . . that a negligent act by a state official does not give rise to section 1983 liability."

[42] Manual of Model Civil Jury Instructions (9th Cir. 2001 ed.) section 11.1, www.ce9.uscourts.gov. last visited April 10, 2006.

decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."[43]

C. The General Verdict For Three of the Defendant Police Officers In The Section 1983 Excessive Force Action Did Not Adjudicate The Officers' Negligence.

As is apparent from the elements of a section 1983 excessive force action discussed above a general verdict for the defendant police officers does not adjudicate the question of their negligence because negligence was not an issue before the jury in the federal trial. Furthermore, the jury did not necessarily determine the shooting by officers Cooper, Devee and Luna was a reasonable use of force under the circumstances.[44] The jury could have found, for example, the shooting was an *un*reasonable use of force under the circumstances but officers Cooper, Devee and Luna were entitled to qualified immunity because they had "a mistaken understanding as to whether a particular amount of force is legal in those circumstances."[45] There is no comparable qualified immunity law in California.[46] Thus the jury in the federal civil rights action did not necessarily resolve the issues relevant to the elements of a negligence cause of action in our state court.

We conclude, therefore, the trial court erred in sustaining the demurrers of officers Cooper, Devee and Luna on the ground of collateral estoppel.

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[43] *Brosseau v. Haugen* (2004) 543 U.S. 194, 198.

[44] See *Harris v. Grimes, supra,* 104 Cal.App.4th at page 187.

[45] *Saucier v. Katz* (2001) 533 U.S. 194, 205.

[46] *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 215; see *Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007, 1016.

III. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR PLAINTIFFS' NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY OF POMONA.

For reasons similar to those explained in Parts I and II we hold res judicata and collateral estoppel do not bar plaintiffs' negligence cause of action against the City of Pomona.

The doctrine of respondeat superior does not apply to an action brought under section 1983.[47] In order to establish a municipality's liability the plaintiff must establish a constitutional violation by the municipality itself, for example a departmental regulation authorizing the use of constitutionally unreasonable force.[48] On the other hand, even if the evidence establishes a constitutional violation by the municipality, such as a regulation authorizing the use of constitutionally unreasonable force, the municipality will not be liable for damages unless the jury finds a municipal officer actually inflicted constitutionally unreasonable harm on the plaintiff.[49]

Under California law, however, municipalities are liable under the doctrine of respondeat superior for the negligent acts of municipal employees.[50] Municipalities are only immune from liability if their employees would be immune.[51] Police officers who use excessive force are not immune from liability under California law.[52]

We cannot determine from the federal jury's general verdict in favor of the city whether the jury found the city did not authorize excessive use of force or whether it

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47 *Canton v. Harris* (1989) 489 U.S. 378, 387.

48 *Monell v. Department of Social Services* (1978) 436 U.S. 658, 690-691.

49 *City of Los Angeles v. Heller* (1986) 475 U.S. 796, 799.

50 Government Code section 815.2, subdivisions (a), (b).

51 Government Code section 815.2, subdivision (b).

52 *Mary M. v. City of Los Angeles*, *supra*, 54 Cal.3d at page 215.

found the city authorized excessive use of force but excessive force was not used in this case.

We can say, however, the officers' negligence was not an issue before the jury in the federal trial for the reasons discussed in Part II above, thus neither was the city's immunity under the California Government Code.

For these reasons the trial court erred in sustaining the demurrer of the City of Pomona.

IV. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR PLAINTIFFS' NEGLIGENCE CAUSE OF ACTION AGAINST OFFICER SANCHEZ.

After the federal jury failed to reach a verdict as to Officer Sanchez the district court, without hearing oral argument, granted his motion for judgment under Rule 50, subdivision (a) of the Federal Rules of Civil Procedure.[53] In doing so it concluded as a matter of law "there is no legally sufficient evidentiary basis for a reasonable jury to find" Sanchez's "use of deadly force was [un]reasonable under the circumstances."[54] The court further found that even assuming Sanchez did use unreasonable force he was entitled to qualified immunity.

Unlike the general verdict in favor of the other three officers, here the basis for the judgment in favor of Sanchez is clear—his use of deadly force was reasonable under the circumstances.

Given the district court's conclusion that as a matter of law no reasonable juror could find Sanchez's use of deadly force was unreasonable Sanchez maintains he is

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[53] See footnote 3, *ante*.

[54] See Rule 50, subdivision (a), Federal Rules of Civil Procedure quoted in footnote 3, *ante*.

entitled to have the plaintiffs' negligence action dismissed under the doctrine of collateral estoppel.

Accepting this argument would lead to two rather ironic results. It would mean the three officers whom the jury may have unanimously found *did not* use unreasonable force will have to stand trial in plaintiffs' negligence action while the officer whom one or more jurors found *did* use unreasonable force will be absolved of liability.[55] It would also imply one or more jurors who had their wits about them when they found in favor of officers Cooper, Devee and Luna lost their senses when they found against officer Sanchez.

On the other hand, there is an obvious logic behind Sanchez's argument that if, as the district court found, his conduct was objectively reasonable it was by definition not negligent.

The solution to this paradox comes from the fact "'reasonable' conduct in civil rights law does not always mean reasonable conduct under negligence law."[56] As previously explained mere negligence is not sufficient to establish liability for a constitutional violation.[57] Indeed, the issue of Sanchez's negligence was not before the district court when it granted judgment under Rule 50, the negligence cause of action having been severed from the claims which went to the jury. Thus when the district court found Sanchez's use of force was "reasonable" it was looking at the evidence from the viewpoint of liability for a civil rights violation. "Reasonable" in this context meant at the very least not reckless or grossly negligent or something else more "blameworthy"

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[55] Under Rule 48 of the Federal Rules of Civil Procedure the verdict in a civil action must be unanimous unless the parties otherwise stipulate. The record before us does not show whether the parties entered into such a stipulation.

[56] *Harris v. Grimes*, *supra,* 104 Cal.App.4th at page 187. See also *Lucas v. County of Los Angeles*, *supra*, 47 Cal.App.4th at page 287 (agreeing that "what is 'reasonable action' within the context of qualified immunity in a section 1983 federal action is not 'reasonable action' for a state law negligence claim.").

[57] See discussion at page 9, *ante*.

than mere negligence.[58] Negligent conduct and reckless conduct are wholly different kinds of conduct and are mutually exclusive.[59]

Edson v. City of Anaheim[60] does not conflict with our holding in the present case. In a battery action against a police officer, *Edson* held the plaintiff has the burden of proving unreasonable force as an element of the tort.[61] The court did not discuss the standard of reasonableness to be applied and, in any event, battery is an intentional tort. The plaintiffs dismissed their negligence claim before the case was submitted to the jury.[62]

The district court's alternative rationale—that Sanchez was entitled to qualified immunity from suit under section 1983—does not bar plaintiffs' negligence action because qualified immunity under section 1983 does not apply to a common law negligence action in California.[63] And for the reasons explained in Part I of our opinion the negligence action is not precluded under the doctrine of res judicata.[64]

We conclude, therefore, plaintiffs' negligence cause of action against Sanchez may go forward.

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[58] See *Lucas v. County of Los Angeles*, *supra*, 47 Cal.App.4th at page 287.

[59] *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 848.

[60] *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269.

[61] *Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at page 1272.

[62] *Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at page 1271.

[63] See discussion at page 14, *ante.*

[64] See discussion at pages 9-10, *ante.*

DISPOSITION

The judgment is reversed. Plaintiffs are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

I concur:

WOODS, J.

PERLUSS, P. J., Concurring.

I concur in the judgment. I agree the trial court erred in sustaining the demurrers of Officers Bert Sanchez, Dennis Cooper, Robert Devee and Anthony Luna and the City of Pomona to the negligence and wrongful death complaint[1] filed by the Estate of George Hernandez and Hernandez's parents, wife and minor children; but my reasons for that conclusion are more limited than those expressed in the majority opinion.

1. *Res Judicata, Primary Rights and the Impermissible Splitting of a Cause of Action*

As the majority explains, once a valid final judgment on the merits has been entered in a lawsuit, the parties or their privies are precluded by the doctrine of res judicata from relitigating the same "cause of action" in a subsequent suit (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795) -- a determination that necessarily requires analysis of the primary rights at issue because "the violation of a single primary right gives rise to but a single cause of action." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.)

Based on well-established case law, discussed and quoted in the majority opinion, I must respectfully disagree with the majority's conclusion the federal civil rights cause of action asserted pursuant to title 42 of the United States Code section 1983 by the Estate of George Hernandez and Hernandez's parents, wife and minor children and their state law negligence and wrongful death causes of action arose from the violation of different primary rights. (See, e.g., *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160 ["'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief

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[1] The state court complaint asserted a cause of action for assault and battery as well as one for negligence and wrongful death. The Estate and Hernandez's survivors do not challenge the trial court's order sustaining the officers' and the City of Pomona's demurrer to the assault and battery claim.

and/or adds new facts supporting recovery. [Citations.]'"]; *Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 681 ["the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised"].)

The plaintiffs suffered a single injury from a single set of circumstances: The death of Hernandez at the hands of Pomona police officers who had allegedly acted unreasonably in using deadly force to apprehend him at the conclusion of a high-speed chase. "The allegation in the state court action that defendants' conduct was negligent as opposed to having been accompanied by a mental state necessary to support a federal civil rights action is simply a different way of expressing an invasion of the same primary rights or the assertion of a different legal theory for recovery." (*Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 447-448 [the right to be free from personal injury and the right to be free from arrest without excessive force "are two aspects of plaintiff's interest in personal security and integrity"]; see *City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077, 1082-1083 [res judicata precludes litigation of state law cause of action for wrongful death after unsuccessful federal civil rights action].)[2]

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[2] *Harris v. Grimes* (2002) 104 Cal.App.4th 180, 187-189, upon which the majority relies, does not support the conclusion distinct primary rights and separate causes of action exist for wrongful conduct violating an individual's constitutional right against unreasonable seizures by law enforcement officers and the common law right to be free from the negligent infliction of personal injuries when the injury allegedly resulted from the use of excess force to effect an arrest. Rather, our colleagues in Division Eight held, as we do in this case, that pursuing a state court negligence action after the federal court declined to exercise its discretionary jurisdiction over such a claim, does not constitute impermissible splitting of a single cause of action: "'A federal court's discretionary refusal to exercise pendent jurisdiction over a state claim does not bar further litigation of the state claim in state court.' [Citation.]" (*Id*. at p. 188.) Indeed, implicit in the *Harris* court's analysis that res judicata does not apply because it was the court, not the plaintiff, that split the cause of action is the conclusion that the same primary right *is* involved in the negligence and civil rights lawsuits based on an allegedly wrongful police shooting. (See *id.* at pp. 187-188.)

Nonetheless, even though a single primary right (and therefore a single cause of action) is involved, I agree with the majority's alternate holding that a federal court's discretionary refusal to exercise supplemental jurisdiction over a state claim does not bar further litigation of the state claim in state court -- at least when the federal court does not dismiss the state-based causes of action until after it has decided the federal civil rights claims. (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 286; see *Harris v. Grimes* (2002) 104 Cal.App.4th 180, 188.) Accordingly, I agree with the majority's conclusion the demurrer by the four officers and the City of Pomona to the state court negligence and wrongful death action filed by Hernandez's estate and his survivors was not properly sustained under the doctrine of res judicata.

2. *Collateral Estoppel and the Determination an Issue Has Been Actually and Necessarily Litigated to Finality*

I also agree the demurrer by the four officers and the City of Pomona was not properly sustained on collateral estoppel grounds, but again for a somewhat narrower reason than my colleagues. As the majority explains, the only documents from the federal civil rights action before the trial court at the time of the hearing and ruling on the demurrer were the federal complaint, the district court's order pursuant to rule 50 of the Federal Rules of Civil Procedure, the judgment entered in the action and the district court's chambers order dismissing plaintiffs' supplemental state law causes of action for assault and battery and wrongful death. The judgment simply states, "The jury, having returned a verdict in favor of defendants Robert Devee, Anthony Luna and Dennis Cooper on the claim for relief alleged against them, and the Court having granted defendant Humberto Sanchez's Fed. R. Civ. P. 50 motion, [¶] IT IS HEREBY ORDERED, ADJUDGED AND DECREED that [¶] 1. Defendants shall have judgment against plaintiffs on their claims for excessive force under the Fourth and Fourteenth Amendments; [¶] 2. Plaintiffs shall recover nothing from defendants; and [¶] Defendants shall recover from plaintiff their costs of suit."

The doctrine of collateral estoppel applies only if the decision in the initial proceeding was final and on the merits and the issue sought to be precluded from

relitigation is identical to that decided in the first action and was actually and necessarily litigated in that action. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "Although a second action between the parties on a different cause of action is not barred by res judicata, nevertheless '. . . the first judgment "operates as an estoppel or conclusive adjudication as to such issues in the second action as were *actually litigated and determined in the first action*." [Citations.]' [Citation.]" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346.)

Without benefit of either the jury instructions or the verdict form used by the jury, it is impossible for us to determine at this time what issues were actually and necessarily decided in the federal litigation and, therefore, to what extent, if any, the doctrine of collateral estoppel is properly applied in this case. Accordingly, as to Officers Devee, Luna and Cooper (and, by extension, the City of Pomona) it was premature to preclude the estate's and the survivors' state law negligence and wrongful death claims on collateral estoppel grounds.

The majority, however, appears to go much farther and hold the federal jury's verdict in favor of these three officers did not necessarily resolve any issue relevant to the state law cause of action. In the absence of more information about the civil rights trial, I am unable to agree. With an adequate record of the federal court proceedings, the trial court may conclude a properly instructed jury necessarily found the three officers' actions were "objectively reasonable" in light of all the facts and circumstances confronting them. (See *Graham v. Connor* (1989) 490 U.S. 386, 396-397 [109 S.Ct. 1865, 1872, 104 L.Ed.2d 443, 456] ["[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."]; see also *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102; *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343.) Such a finding, if it was in fact necessarily part of the jury's verdict, would properly preclude relitigation of the question whether the officers failed to use reasonable care to prevent harm to Hernandez, an essential element of the state law negligence and wrongful death

claims. (See CACI No. 401 ["Negligence is the failure to use reasonable care to prevent harm to oneself or to others."]; see generally *Munoz*, at p. 1102, fn. 6 ["Federal civil rights claims of excessive force are the federal counterpart to state battery and wrongful death claims; in both, the plaintiff must prove the unreasonableness of the officer's conduct."]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1412-1413.)[3]

As to Officer Sanchez, after the jury failed to reach a verdict, the district court granted his posttrial motion pursuant to rule 50 of the Federal Rules of Civil Procedure to dismiss the action against him based on the doctrine of qualified immunity. The court ruled Sanchez was entitled to qualified immunity, finding, "[E]ven assuming Officer Sanchez had violated Hernandez's Fourth Amendment rights, this Court finds that Officer Sanchez is entitled to qualified immunity. . . . . Officer Sanchez reasonably could have believed that his conduct was lawful under the circumstances." As the majority explains, that finding has no bearing on the state court negligence and wrongful death action because the federal doctrine of qualified governmental immunity does not extend to state tort claims against government employees (see *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 755-756 ["Governmental immunity for claims of violation of civil rights under section 1983 is not conferred expressly by statute, but is based upon a judicial gloss on section 1983," whereas "governmental immunity under California law is governed by statute."]) and the determination Sanchez could have believed his conduct

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[3] At oral argument counsel for Hernandez's estate and his survivors suggested the challenge to the officers' conduct in their negligence claim extended beyond the actual use of deadly force to include the totality of the circumstances involving the high-speed chase, foot pursuit and ultimate shooting of Hernandez. However, the trial court expressly ruled any claims contained in the second cause of action for negligence and wrongful death that did not involve the alleged use of excessive force, including the allegation the defendants had failed to summon medical aid, survived the demurrer. Hernandez's estate and his survivors then stipulated to strike and dismiss with prejudice those surviving portions of their complaint to permit entry of a final judgment.

was lawful does not in any way preclude a finding he was negligent in firing at Hernandez.

Prior to reaching the issue of qualified immunity, however, the district court made a factual finding Sanchez's use of deadly force was reasonable under the circumstances. Although that finding is part of the analysis properly performed by the court as a prelude to determining the qualified immunity question (see, e.g., *Saucier v. Katz* (2001) 533 U.S. 194, 201 [121 S.Ct. 2151, 150 L.Ed.2d 272]), as the district court acknowledged, it was in fact unnecessary to its ruling on qualified immunity -- the only issue properly before the court at that time. Accordingly, because the issue of the reasonableness of Sanchez's conduct was not actually resolved by the jury or necessarily determined by the court, Sanchez is not entitled to any collateral estoppel benefit from the judgment in his favor in the federal civil rights action. (See *Lucido v. Superior Court, supra*, 51 Cal.3d at p. 341.)

PERLUSS, P. J.